INTERIM RULES ON COMPENSATION ENTITLEMENT OF DIRECTORS'/TRUSTEES' OF GOCC BOARDS COVERED BY RA NO. 10149

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- GCG Mandate on Compensation of Members of GOCC Boards

1.1 Section 23 of Republic Act No. 10149, otherwise known as the "GOCC Governance Act of 2011" (RA No. 10149), provides in part that —

The charters of each of the GOCCs to the contrary notwithstanding, the compensation, per diems, allowances and incentives of the members of the Board of Directors/Trustees of the GOCCs shall be determined by the GCG using as reference, among others, Executive Order No. 24 dated February 10, 2011; Provided, however, That Directors/Trustees shall not be entitled to retirement benefits as such director/trustees. (emphasis supplied)

1.2 As part of the Compensation and Position Classification System (CPCS) that the Commission is mandated to promulgate and which shall be applicable to all GOCCs covered by RA No. 10149[1], the Commission shall be evolving a Directors'/Trustees' Compensation System which shall be based preliminarily on Executive Order No. 24, s. 2011 (EO No. 24).

1.3 In the interim period, therefore, the terms of EO No. 24 constitute the rules and regulations pertaining to entitlement to per diems and other compensation by members of the Boards of Directors/Trustees of GOCCs, unless otherwise formally amended or revised by the Commission pursuant to its power under Section 23 of RA No. 10149.

- PARTICULAR PROVISIONS OF EO NO. 24 CONSTITUTING PART OF THE INTERIM RULES

2.1 A copy of EO No. 24 is attached hereto and made an integral part of this memorandum, and the particular provisions thereof as indicated immediately hereunder, including the contents of this memorandum, are hereby formally promulgated as the "Interim Rules on Compensation Entitlement of Directors'/Trustees' of GOCC Boards Covered by RA No. 10149," thus:

(a) Particular Provisions of EO No. 24

Section 1. Policy Considerations

Section 2. Definition of Terms

Section 3. General Provisions

Section 6. GOCC Classification

Section 7. Compensation of Members of the Board of Directors/Trustees

Section 8. Compensation Structure

Section 9. Per Diems for Board Meetings

Section 10. Per Diems for Committee Meetings

Section 12. Reimburseable Expenses

(b) Performance-Based Incentives (PBI) for GOCCs Boards are suspended until a comparative and comprehensive study has been undertaken by the GCG and forming part of the Directors'/Trustees' Compensation System that shall be promulgated within the soonest possible time.

(c) Special Rules shall be formulated and recommended by the GCG to the President of the Philippines for his approval for GOCCs Organized Solely for the Promotion of Social Welfare and the Common Good in accordance with the second paragraph of Section 23 of RA No. 10149, thus:

In case of GOCCs organized solely for the promotion of social welfare and the common good without regard to profit; the total yearly per diems and incentives in the aggregate which the members of the Board of such GOCCs may receive shall be determined by the President upon the recommendation of the GCG based on the achievement by such GOCC of its performance targets.

(d) The applicable Rule on Restitution shall be Section 24 of RA No. 10149 which reads as follows:

SEC. 24. Restitution. – Upon the determination and report of the Commission on Audit (COA) that properties or monies belonging to the GOCC are in the possession of a member of the Board or Officer without authority, or that profits are earned by the member of the Board or Officer in violation of the fiduciary duty, or the aggregate per diems, allowances and incentives received in a particular year are in excess of the limits provided under this Act, the member of the Board or Officer receiving such properties or monies shall return the same to the GOCC.

Failure to make the restitution within thirty (30) days after a written demand has been served shall, after trial and final judgment, be punished by an imprisonment of one (1) year and a fine equivalent to twice the amount to be restituted and in the discretion of the court of competent jurisdiction, disqualification to hold public office.

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- GCG RULINGS CONSTITUTING PART OF THE INTERIM RULES

The Commission has issued rulings to various GOCC applications under E.O. No. 24, and which are hereby consolidated and made an integral part of these Interim Rules.

3.1 Coverage of "Ex-Officio Member" of GOCC Boards

3.1.1 The distinction between "Ex Officio Members" and "Appointive Members" is critical in determining who among the members of the Board of Directors/ Trustees in GOCCs are entitled to per diems and other compensations, since under Section 7 of EO No. 24:

- Ex-Officio members, including their Authorized Alternates/ Representatives, shall not be entitled to any additional compensation for their services as such"; and

- the "Compensation granted to Ex-Officio Board Members of subsidiaries or private corporations wherein a GOCC has investments shall accrue to the GOCC represented."

3.1.2 Both EO No. 24[2] and RA No. 10149[3] define an "Ex Officio Board Member" to mean "any individual who sits or acts as a member of the Board of Directors/ Trustees by virtue of one's title to another office, and without further warrant or appointment." Such technical definition of Ex Officio Board Member means that whenever a person requires a formal appointment into a GOCC Board or requires a formal nomination and election into the Board in a stockholders' or members' meeting, then such elected director or trustee would not be an Ex Officio Board Member.

3.1.3 To illustrate, if the charter of a GOCC provides for three (3) representatives from the government sector, those who are nominated and elected to cover those slots, or those who are appointed by the President of the Philippines, to fill those slots, are considered to be Appointive members of the Board, even though the main consideration for their appointment or election into the GOCC Board is by virtue of their being public officers.

3.1.4 Nonetheless, such result does not exempt the public officer from the rule against additional or double compensation.

3.2 Rule on Public Officials Against Additional or Double Compensation

3.2.1 Since directors or trustees of GOCCs are by definition considered to be "public officers"[4] or "public officials",[5] then public officers who are members of GOCC Boards, whether they are classified as "Ex Officio Members" or "Appointive Members", would be governed by the rule against additional or double compensation found under Section 56 of Book V, Title I, Subtitle A of the Administrative Code of 1987, which states, "No elective or appointive public officer or employee shall receive additional or double compensation unless specifically authorized by law," thus:

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Sec. 56. Additional or Double Compensation. – No elective or appointive public officer or employee shall receive additional or double compensation unless specifically authorized by law nor accept without the consent of the President, any present, emolument, office, or title of any kind from any foreign state.

Pensions and gratuities shall not be considered as additional, double or indirect compensation.[6]

which is an implementation of Section 8, Article IX-B of the Constitution provides that —

Sec. 8. No elective or appointive public officer or employee shall receive additional, double, or indirect compensation, unless specifically authorized by law, nor accept without the consent of the Congress, any present, emolument, office, or title of any kind from any foreign government.

Pension or gratuities shall not be considered as additional, double, or indirect compensation.[7]

3.2.2 There is no doubt that per diems are now deemed part of compensation.

3.2.3 Although it may be argued that EO No. 24 may constitute the legal authorization to grant double compensation (by way of per diems and other allowances) for Appointive Directors who are public officers, nonetheless, the prevailing doctrine is that found in Sadueste v. Municipality of Surigao,[8] that the meaning of the phrase “specifically authorized by law” does not cover a general grant of authority under statutory law for all government officers (such as in that case for all district engineers), but that: “The authority required by the Constitution to receive additional or double compensation is a specific authority given to a particular employee or officer of the Government because of peculiar or exceptional reasons warranting the payment of extra or additional compensation.”[9]

3.2.4 Consequently, unless the charter of the particular GOCC in which a public officer sits as a member of the Board specifically provides that the members of the Board are entitled to receive per diems and other compensation, there is no legal basis for such public officer to receive any per diem or other compensation to which members from the private sector are entitled to.

3.3 Obligation of Appointive Directors and Ex-Officio Directors to Turn-Over “Excess” or “Additional” Per Diems, Compensation and Benefits to the GOCCs

3.3.1 Section 7 of EO No. 24, which distinguishes between “Appointive Directors” and “Ex Officio Directors,” provides that “[t]he compensation of members of the Board of Directors/Trustees shall be in accordance with the following rules,” which for purposes of ease of analysis have been re-arranged as follows:

Rules for Ex-Officio Directors:

a)

. . . government officials, who are Ex-Officio Board Members, including their Authorized Alternates/ representatives shall not be entitled to any additional compensation for their services as such;[10]

x x x

c)

Compensation granted to Ex-Officio Board Members of subsidiaries or private corporations wherein a GOCC has investments shall accrue to the GOCC represented;[11]

Rules for Appointive or Elective Directors:

b)

Appointive or Elective Board Members may receive compensation as set forth herein unless specifically prohibited by law or Charter;

x x x

d)

Compensation granted to Appointive or Elective Board Members representing a GOCC in a private corporation where the GOCC has investments shall not exceed the allowable compensation of the members of the Board of Directors/Trustees of the GOCC represented. Any excess shall accrue and be remitted to the GOCC represented within fifteen (15) days.

3.3.2 There are situations peculiar to some of the subsidiaries of GOCCs where the term “Ex-Officio Board Members of subsidiaries or private corporations wherein a GOCC has investments,” would have no legal significance under an observation of the OFFICE OF THE GOVERNMENT CORPORATE COUNSEL (OGCC) that most subsidiaries and private corporations are organized under the Corporation Code, and therefore all members of their governing boards would unlikely fall within the definition of “Ex-Officio Board Members” which requires that one must occupy a board seat by virtue of charter or by law.

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3.3.3 The only logical interpretation of the phrase "Ex-Officio Board Members of subsidiaries or private corporations wherein a GOCC has investments" in Subsection 7(c) of EO No. 24, if it is to have any actual legal and administrative significance at all, would be as that interpreted earlier by the TASK FORCE FOR CORPORATE COMPENSATION (TFCC): GOCC directors and officers designated in the governing boards of the subsidiaries in which GOCCs have investments, would have the same inhibitions as though they sit as Ex-Officio Directors in the boards of subsidiaries.

3.3.4 There is, admittedly, a defect in the construction of the provisions of EO No. 24, but there is little doubt on the rationale and purpose sought to be achieved: a clear limitation of the entitlement of GOCC directors/trustees, whether they be appointive or ex-officio, to per diems and other forms of compensation they are entitled to receive:

a)

Appointive Members are entitled to receive per diems and other allowable forms of compensation but only within the limitations placed under EO No. 24;

b)

Ex-Officio Members are not entitled to receive for themselves any form of per diem or compensation, for it would constitute "additional compensation."

3.3.5 More importantly, there is every intention under Section 7 of EO No. 24 to oblige directors, trustees and officers to pass on to the GOCC they represent, the "additional compensation" that both Appointive Directors and Ex-Officio Diretors may receive by sitting in the boards of their subsidiaries, thus:

c)

Compensation granted to Ex-Officio Board Members of subsidiaries or private corporations wherein a GOCC has investments shall accrue to the GOCC represented;

x x x

d)

Compensation granted to Appointive or Elective Board Members representing a GOCC in a private

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corporation where the GOCC has investments shall not exceed the allowable compensation of the members of the Board of Directors/Trustees of the GOCC represented. Any excess shall accrue and be remitted to the GOCC represented within fifteen (15) days.

3.3.6 The same principle is now enshrined in Section 20 of RA No. 10149, which constitutes GOCC directors/Trustees, whether ex-officio or appointive, to be bound by a "Trustee Relation to the Properties, Interests and Monies of the GOCC," and provides that "except for the per diems received for actual attendance in board meetings and the reimbursement for actual and reasonable expenses and incentives as authorized by the GCG, any and all realized and unrealized profits and/or benefit including, but not limited to, the shares in the profits, incentives of members of the Board or Officers in excess of that authorized by the GCG . . . and any benefit from the performance of members of the Board or Officers of the Corporation acting for and in behalf of the GOCCs in dealing with its properties, investments, in other corporations, management of subsidiaries and other interest, are to be held in trust by such member of the Board or Officer for the exclusive benefit of the GOCC represented. "[12]

Adopted: 08 February 2012

BY AUTHORITY OF THE COMMISSION:

SGD.) CESAR L. VILLANUEVA

Chairman

(SGD.) MA. ANGELA E. IGNACIO

(SGD.) RAINIER B. BUTALID

Commissioner

Commissioner

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[1] Sec. 8 Coverage of the Compensation and Position Classification System. The GCG, after conducting a compensation study, shall develop a Compensation and Position Classification System which shall apply to all officers and employees of the GOCCs whether under the Salary Standardization Law or Exempt therefrom and shall consist of classes of positions grouped into such categories as the GCG may determine, subject to the approval of the President.

[2] Sec. 2 (f)

[3] Sec. 3 (i)

[4] Sec. 2 (b), Anti-Graft and Corrupt Practices Act (R.A. 3019, as amended): Public officer: includes elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the government as defined in the preceding subparagraph.

[5] Sec. 3 (b) Code of Conduct and Ethical Standards for Public Officials and Employees (R.A. No. 6713); Public Officials: includes elective and appointive officials and employees, permanent or temporary, whether in the career or non-career service, including military and police personnel, whether or not they receive compensation,

regardless of amount.

[6] Emphasis supplied.

[7] Emphasis supplied.

[8] 72 Phil. 485 (1941)

[9] Ibid, at pp. 487-488

[10] Emphasis supplied.

[11] Emphasis supplied.[12] Emphasis supplied.

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